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IN THE

Supreme Court of the United States

October Term, 1965

No. 739

GIBRALTER AMUSEMENTS, LTD.,
Petitioner and Bankrupt-Appellant,

v.

THE WURLITZER COMPANY, WURLITZER ACCEPTANCE CORPORATION, WILLIAM F. WADSWORTH and THE NATIONAL BANK OF WESTCHESTER, Petitioning Creditors, Intervening Creditor, and M. HALLSTED CHRIST, Trustee,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, made in the above-entitled proceeding on July 26, 1965, and in which a petition for re-hearing *en banc* was denied by the said court on August 17, 1965.

Citations to Opinions Below

The decision of the Court of Appeals, dated July 26, 1965, is not reported; however, it is printed as Appendix C; the application for review *en banc* and the denial

thereof, and the decision of the United States District Court for the Eastern District and of the Referee, are printed herein as Appendices A through F, inclusive.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Question Presented

Whether the bankrupt is a party aggrieved and may, pursuant to General Order 21 (6), petition for reconsideration of any claims presented in its involuntary bankruptcy.

Statute Involved

Subdivision 6 of Section 21, "Proofs of Claim," General Orders in Bankruptcy, reads as follows:

> "When the Trustee or any creditor or the bankrupt or debtor shall desire the reconsideration of any claim allowed against the estate, he may apply by petition to the referee to whom the case is referred for an order for such reconsideration, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."

Statement of the Case

The petitioner, Gibraltor Amusements, Ltd., is the non-discharged bankrupt.

On March 18, 1960, an involuntary petition in bankruptcy was filed by the respondent, The Wurlitzer Company, as a sole creditor, alleging the existence of less than twelve creditors of the bankrupt. Thereafter an amended involuntary petition was filed by The Wurlitzer Company (Wurlitzer) on May 5, 1960, again alleging less than twelve creditors; however, one, William F. Wadsworth, Wurlitzer Acceptance Corporation (WAC) and a Joseph Rao, were granted leave to intervene at about this time, as petitioning creditors. Subsequent to the adjudication in bankruptcy on August 6, 1960, the petition of Joseph Rao was disallowed because his claim was contingent. Still subsequent thereto, the National Bank of Westchester sought and obtained leave to intervene as a creditor. After the adjudication in bankruptcy on August 19, 1960, the estate was administered by the former Receiver as Trustee, who still so administers it. On December 13, 1963, by virtue of an order to show cause returnable December 17, 1963, a newly-elected officer of the within bankrupt appeared in the proceedings claiming lack of jurisdiction over the bankrupt in the United States District Court for the Eastern District of New York because of the absence of valid service, non-appearance and commission of fraud by the petitioning creditors; as either one, alone, would have been sufficient to deprive the court of jurisdiction, the presence of both, the jurisdictional defect and the fraud, must certainly have resulted in deprivation of jurisdiction over this bankrupt by the United States District Court for the Eastern District of New York. The prayer for relief in the show cause order requested vacatur of the adjudication in bankruptcy.

Limited hearings were held in January, 1964; on jurisdiction as derived from service of the petition and writ of subpoena and appearance. The question considered was: Did jurisdiction in the Eastern District Court result from the service of the petition and writ of subpoena outside of the territorial jurisdiction of the issuing court, without any ancillary or other established proceedings therefor, at a place which was not the alleged bankrupt's place of business, but that of another corporation by which Alexander Goldberg, one of the Gibraltor officers, was employed, and not upon this officer but upon William F. Wadsworth, (one of the petitioning creditors), a short time, truck driver employee, who was not then or ever, an officer of the bankrupt corporation?

The petition and writ of subpoena were served at 599 Tenth Avenue, New York City, New York, which is within the territorial jurisdiction of the United States District Court for the Southern District of New York. That Wurlitzer, the filing creditor, knew this was not the address of bankrupt is easily determined from the petition itself, for the address of Gibraltor is there given as 65 Albany Avenue, Freeport, New York, in the County of Nassau. This was Gibraltor's only office.

Regular established procedure for extra-territorial service not being followed, it is claimed that this service does not, and cannot, confer jurisdiction of the Eastern District Court over the bankrupt; furthermore, to allow it to stand would be to allow a precedent to stand which is destructive of the principles of regularity in Federal procedure.

Regarding the charges of fraud raised by the order to show cause, these were referred to a Referee in Bankruptcy to hear and determine. Upon the first appearance of this matter on his calendar on May 14, 1964, the

Referee granted an oral motion of the petitioning creditors, joined in orally by the Trustee, and most fortuitously supported by a brief of the petitioning creditors, to dismiss the said charges, although this same Referee, in his decision, stated that this case presented a "very signal and interesting point of law".

Appeals were taken to the Second Circuit on the question of jurisdiction, i.e., whether a District Court, sitting as a Court of Bankruptcy, is confined to its territorial limitations in the service of initial process in bankruptcy proceedings, as well as from the decision dismissing the allegations of fraud. Both appeals were denied without opinion. The petitioning bankrupt, unfortunately, was unable to perfect its appeal to the Supreme Court of the United States on these two questions because of illness of counsel. The denial of an application for enlargement of time terminated these appeals.

At the hearings prior to the adjudication in bankruptcy on August 19, 1960, the petitioning creditors were not required to prove any claims, nor were hearings held upon the claims; an attorney, retained by one, Sanford J. Moore, the then New York distributor for Wurlitzer, to protect his individual interests, conceded all claims and the concession was accepted—even in spite of the fact that he was not retained by, nor authorized to appear for, the bankrupt.

As to The Wurlitzer Company, reconsideration is sought because:

a. Wurlitzer did not, at any time, as is required by the Personal Property Law of the State of New York, give any statement of account to its distributor or to its customer, the bankrupt within. The bankrupt, having

allegedly guaranteed all of the obligations of the distributor, became independently entitled to such a statement of account.

b. This assumption of the obligation by the bankrupt was without any consideration, contrary to New York law. The devices used for such assumption were conditional sales contracts or consolidated conditional sales contracts or chattel mortgages, which created and pyramided a paper obligation, clothed, as a result of filing, with the dignity of a record obligation. In many instances, not only did the bankrupt not have possession of the chattels set forth in any one particular instrument, but, as to those listed in the chattel mortgages, it did not have title either. At any time, Wurlitzer could, as it did here, claim one or more breaches of these paper agreements on the part of the bankrupt, even though, in truth and in fact, no breach could have been caused by the bankrupt where it did not have possession or title. The obligations so created make up a substantial part of the claim of Wurlitzer in the sum of $1,064,832.87.

c. The indebtedness charged to Gibraltor was artfully contrived to show liabilities far in excess of the net worth and its purported hopeless insolvency. Also, to ensure to Wurlitzer full payment on whatever obligations were actually due and owing to it. The means used were simple enough in themselves. For example:

Not crediting Gibraltor with payments made by it on its own purchases.

Not deducting from the total of the guaranteed obligations the direct indebtedness of Gibraltor for purchases. To the contrary, this direct liability was charged to Gibraltor *de novo* by inclusion in the guaranteed debts.

Not crediting Gibraltor with substantial weekly payments made by it within the four month period prior to the filing of the petition in involuntary bankruptcy on March 18, 1960, and for about one week thereafter, which total the approximate amount of $250,000.00.

Duplicating charges, by repeating a substantial number of chattels again and again, sometimes as many as five times, in the various contracts and agreements. Since each repetition represents approximately $850.00, (the wholesale price of the juke box), the total of all such repetitions adds up to a most considerable sum.

Not allowing credit for machines which were returned to Wurlitzer.

Adding in the obligations of a company which is not involved in this bankruptcy and whose indebtedness, if any, was not guaranteed by bankrupt, i.e., Sandy Moore Pennsylvania Corp.

It did not give credit for money found in the juke boxes at the time of their seizure, and which money does not appear even as an estate asset.

It did not give credit for over 100,000 records which were seized with the machines, each record representing 50¢.

It failed to deduct the amounts due on third party contracts which were paid in full by the third party purchasers.

It failed to give credit, by way of set-off, for payments made by the distributor into the "Hold Back", "Bad Debt" or "Equity" reserve, which the distributor had to, and did, maintain at all times herein with Wurlitzer, and which reserve was then, and is now, in the possession of Wurlitzer and is in a very substantial sum. What hap-

pened to this reserve? Evidently, it was not used as intended, to pay off defaulted third party obligations before charging the distributor therewith. It would appear that all such third party obligations were, without exception, charged to the distributor and, sequentially, to Gibraltor. Since this reserve fund was not, in the bankruptcy proceedings, used as a set-off against the liabilities charged under the guarantee, Wurlitzer must be considered a secured creditor to the full extent of the reserve fund. Only those claims which exceed the reserve fund could be considered herein. The amount of the equity reserve is not stated. One cannot determine whether all, or a portion, of the Wurlitzer claim, has been paid from this reserve fund, and if a portion, the extent to which this claim was paid.

In failing to give notice to Gibraltor, as obligor under the guarantee, of any defaults on third party paper. For it was only by default that Gibraltor's contingent liability under the guarantee became a fixed liability. This lack of notice prevents any determination as to what portion of the guaranteed obligations became fixed obligations at, or prior to, the time of the filing of the petition in involuntary bankrutcy, and what portion remained contingent. Instead of segregating the debts according to their nature, i.e., fixed or contingent, Wurlitzer proceeded to include all third party obligations in its claim. This is more than pyramiding; this is piracy.

d. The Wurlitzer claim, during the pendency of these bankruptcy proceedings, was not subjected to any offset whatever on collections made directly by Wurlitzer from third party customers after the filing of the petition in bankruptcy; in many instances, Wurlitzer sued on such obligations in its own name. The total of all such collections is unknown, for what Wurlitzer received, it kept,

advising no one, least of all the Court and the Trustee, even though the obligations upon which it received payments were, and still are, included in the overall total.

e. It included shipments made to distributor on open account, in spite of orders to the contrary, and which were refused and returned.

f. It included chattels shipped to distributor after October 1, 1959, and which were paid for in cash, the distributor being on C.O.D. on and after such date.

The reasons listed above are, apart from others, sufficiently meritorious to warrant reconsideration. Consideration of the guarantee and its validity emphasizes the need for reconsideration. For this document, which is the basis for Gibraltor's entire liability to Wurlitzer, excepting, of course, its own purchases, is a void guarantee. Apart from the fact that there was no consideration to the bankrupt therefor, this guarantee did not contain a stockholders' consent as required by the laws of this state. The consent which is attached to the guarantee is that of a person who was not a stockholder on the date of its alleged execution. This consent depends for its validity upon a pledge agreement ostensibly executed by the then stockholder of Gibraltor but which, instead, bears a forged signature of the stockholder. The forgery voids the pledge agreement; with it goes the alleged stockholder's consent.

An odd fact for which there appears to be no rationale is that Wurlitzer, by virtue of stock certificate No. 151, became a stockholder of all the authorized, issued stock of Gibraltor, to wit, 3 shares. According to this, assuming this stock certificate was validly issued, it appears that an undisclosed principal-subsidiary relationship ex-

isted at the time of the filing of the petition in involuntary bankruptcy, and that the proper party from whom to obtain a stockholder's consent to validate the guarantee referred to above, would have been Wurlitzer!

There are two chattel mortgages involved which are alleged to have been executed by the officers of this bankrupt, one on September 17, 1959, and one on October 5, 1959. Proceedings are even now pending in the Supreme Court, Nassau County, to expunge both. The September, 1959, chattel mortgage, because of forgery in the signature of the officer who is supposed to have executed it, and in the signature of the witness who is supposed to have witnessed the execution. The October, 1959, chattel mortgage, because the guarantee contained therein was backdated without the knowledge and consent of the bankrupt, because of lack of consideration and other substantial defects. These two void mortgages are important for it is by these instruments that chattels not sold by Wurlitzer, to bankrupt or otherwise, and not owned by bankrupt, became subject to levy by Wurlitzer.

The Bankruptcy Act places upon bankrupts the duty of advising their trustees of instances of fraud. This bankrupt has more than discharged its duty. It not only called the attention of the Trustee to these and other frauds, forgeries and other instances of disregard of law, but it has also taken affirmative steps to try and obtain hearings thereon. The endeavors of the bankrupt were not successful. For the Trustee in Bankruptcy saw fit to align himself with the creditors and refused to inquire into the charges, not even to make fundamental inquiries to ascertain whether there is any substance to them.

The claims of Wurlitzer, based upon conditional sales contracts, appear to be those of Wurlitzer Acceptance Corporation; each contract bears an assignment on the

reverse side thereof whereby Wurlitzer assigned to WAC without recourse; none bears an assignment back to Wurlitzer. One must conclude, then, that the major petitioning creditor, Wurlitzer, is not the proper party in interest. WAC is the proper party. That WAC did not appear as such in the bankruptcy is understandable since WAC was not and is not, authorized to do business within the State of New York. Whether Wurlitzer is authorized to do business in New York is an open question. This company had not, at that time, or any time to date, complied with General Corporation Law §8 and Business Corporation Law §104 (b), 402 (3). The penalty prescribed by Section 104b, General Corporation Law, for non-compliance is modification of the status of the corporation involved to that of an unauthorized corporation. Accordingly, both corporations may have been improperly accepted as petitioning creditors. As for the two claims presented by WAC in the bankruptcy, the following reasons are set forth for reconsideration thereof:

g. Out of the two claims, one was current at the time WAC filed as petitioning creditor; the other was paid in full for the actual number of machines received by the purchaser.

h. Both of these debts have been since paid off. By not striking them from the bankruptcy claims, WAC will be permitted to collect twice. And Wurlitzer, under the guarantee, will be allowed to collect on these claims as though they were unpaid.

i. WAC claimed the benefits of the guarantee as assignee of Wurlitzer even though the assignment was without recourse.

j. The notes were void for usury. Both notes charged 7½% interest per annum whereas the legal rate of interest in New York for individuals was then, and still is, 6%.

As for William F. Wadsworth, this person became a petitioning creditor for alleged wages due in the sum of $125.00 for a one week work period. This, in spite of the fact that payments were shown to have been made to him during this period in an amount in excess of this claim. The Referee found this amount to be due and owing, not as wages, but in lieu of workmen's compensation benefits which were undetermined at that time, for an injury sustained by Wadsworth while in the employ of someone other than the bankrupt herein. No award had been made by the Compensation Board at the time that Wadsworth filed as a creditor in this bankruptcy, nor at the time of the Referee's finding. The award was made several months later. When made, it was not charged to Gibraltor, which carried compensation insurance, but to the employer of this creditor at the time of his injury and paid by such employer's carrier. At best, the Referee's finding was against an award in futuro and in violation of 11 USCA 103(6). However, since Wadsworth received full payment from Workmen's Compensation benefits, allowing him to collect again in this bankruptcy would be permitting him to profit by his wrongfully asserted claim and receive a double or, perhaps, triple payment, if one takes into consideration excess payments made to him and which Wadsworth claimed were loans but which still remain unrepaid. This claim, upon reconsideration, should be dismissed.

The National Bank of Westchester, an intervening creditor, bases its claim upon a confession of judgment executed by Sanford J. Moore and his wife, Estelle Moore.

The acknowledgment in the said confession of the signature of Estelle Moore is a forgery. Proceedings are pending locally to expunge this guarantee from the record because of the forgery. Under the circumstances, reconsideration is certainly required for it may well result in total disallowance of this claim.

Milton Negrin, another intervening creditor, bases his claim on a promissory note given to him by Sanford J. Moore, allegedly as an officer of the bankrupt. This claim should not be allowed. There is no showing that the bankrupt was the recipient of the loan transaction or that Milton Negrin did not know that Sanford J. Moore was not an officer and was not authorized to act for the bankrupt, or to sign as such officer.

These reasons are sufficient in themselves to warrant reconsideration of each and every claim of the creditors herein; yet they have been consistently disregarded by the courts below. Just as the statutory provisions for computing the number of creditors, found in 11 USCA 95, have been disregarded and an employee was allowed and counted as a creditor, and secured creditors were also as well as a creditor who received preferential payments.

Reason for Granting the Writ

Under General Order 21 (6) it has been held that a bankrupt may look to expunge a claim filed against the estate, whether the estate is solvent or insolvent. Not only this General Order, but 11 USCA Sections 11(2) and 93 provide for re-examination of allowed claims at any time before the closing of the bankruptcy estate. The bankrupt is considered to be a party in interest, regardless of estate solvency, and has a right to object to allowance of a claim. *In re Povill,* 105 F. 2d 157. Although

reconsideration proceedings are limited only as to those claims which are sought to be expunged or diminished, this is not a bar to the within petition, because that is precisely the relief this bankrupt is seeking. General Order 21(6) contains no initial requirement that a bankrupt prove itself to be a party aggrieved. Had there been such a requirement, this bankrupt would have easily qualified. It is not discharged. Nor can it ever be discharged from the tax claims. *In re Lewensohn,* 121 F. 538, held, this General Order regulates the procedure for re-examination without regard to the party by whom made or the time when it may be pursued. It neither adds to, nor subtracts from, the duties of a bankrupt, or a trustee. 11 USCA 25 charges a bankrupt with the duty of reporting to his trustee on the correctness of claims filed and disclosing immediately to his trustee any facts coming to the bankrupt's attention as to incorrectness of filed proofs of claim, as to falseness of claims filed, as to any attempt by creditors or other persons to evade the provisions of this act. *In re Ankeny,* 100 F. 614, *A. B. Carton Co.,* 148 F. 63.

Under general equitable principles, a bankrupt has a right to object to illegal claims. Section 93 of 11 USCA sets forth the data to be contained in a proof of claim, i.e., the manner in which the said claim arose, the consideration therefor, whether it is still due and owing; subdivision (b) requires a claim, founded upon a written instrument, embody such instrument; it further provides that claims, duly proved, shall be allowed upon presentation unless objection to the allowance shall be made by any party in interest or unless consideration thereon shall be discontinued for cause by the court upon its own motion or that of others. The trustee is among those others. The trustee is, at all times, under the affirmative duty of scrutinizing all claims. And if the trustee reaches the

conclusion that they are vulnerable, *he is to seek reconsideration* under 11 USCA 93. *In re Brown,* 118 F. 2d 198.

This bankrupt complied with the statutory duty imposed upon it. It gave notice of the frauds to its trustee. The trustee did nothing. Since the trustee failed in his duty, the bankrupt then exercised its right under the law and sought reconsideration upon its own.

Section 93 of the Act does not conflict with General Order 21 (6). It complements it. Both this section and the general order give to a referee or to a court of bankruptcy, as well as to others, the right to move for review and revision of claims presented by any creditor and to correct the original order adjudicating the claim after reconsideration. In a case such as ours, where, in the first instance, none of the creditors were required to present any proof of the claims made because they were conceded (although invalidly) and where, thereafter, evidence of fraud was obtained which, when sought to be presented to the trustee and to the court, was disregarded, the reasons for reconsideration and review of each and every claim are that much more emphasized and make such requested relief practically mandatory. That the claims were previously allowed by the Referee is no bar to reconsideration, for it has been held, *In re Jule Motor Corp.,* 34 F. Supp. 742, that an allowance of claims by a referee in the first instance is not *res adjudicata* to a later reconsideration. It has been further held that a bankruptcy court is a court of equity, and as such, has power to set aside false claims where the issue of fraud was not previously adjudicated. *Heiser* v. *Woodruff,* 327 U. S. 726. In the instant case, there has been absolutely no previous adjudication on the question of fraud. It has been further held that if part of a petitioning creditor's claim is valid and the other part is invalid for fraud, or any other

reason, the claim is not allowed in any sum. *In re Flick*, 105 F. 503. Ordinarily, a Court of Appeals will not disturb the findings of a lower court as to a claim unless, in the first instance, the claim is unsupported by evidence. There was no evidence in this case, only unauthorized concessions. *In re Lawrence*, 134 F. 843.

The charges herein raised by the bankrupt and the objections made by the bankrupt to the payment of any of these claims, by their very nature, require they be heard and determined. Otherwise, denying reconsideration will result in the peculiar situation of the courts, to whom notice of frauds was sought to be given time and time again, and which refused to take any note of such frauds committed by the creditors in this bankruptcy, of becoming parties to each and every fraud alleged; in such a position, whatever the courts have done or will do in the future cannot be held to be other than invalid, they were parties to the frauds. The adjudication in bankruptcy, having its basis in fraud, is void. All proceedings had thereunder are, consequently, void.

For as long as an estate has not been closed, claims which have been allowed may be reconsidered; they may be reviewed in whole, they may be reviewed in part. If a dividend has been paid, to which the receiving party is not entitled, it must be refunded. This estate has not been closed. No date bar is, or can be, present.

As for provability of claims, that is a burden devolving upon the claimants. If the claimants can not carry that burden and prove each and every item of the claims which led to the extraordinary million dollar total, that, itself, becomes an additional reason for expunging their claims against this bankrupt. *Zeitinger et al.* v. *Hargadine-McKittrick Drygoods Co.*, 244 F. 719, very clearly stated the principle that a court of bankruptcy cannot be com-

pelled to exercise its jurisdiction in aid of fraud, and has the power to intervene in prevention thereof. In the case cited, stockholders were permitted to contest a voluntary petition filed by officers and directors of the alleged voluntary bankrupt and to proceed against the corporation and its directors for appointment of a receiver of the corporate assets and for an accounting because of fraud, mismanagement, loss and waste of the corporate assets. The basis for its reason was simply this: to do otherwise would be a fraud upon the court, aided and abetted by the court, " * * * that there is and can be no law or practice which would compel a court of bankruptcy or any other court, to become a party to a fraud" (p. 722). This principal guided the court to its decision. The testimony adduced before it caused the court to further hold that the only purpose for filing the petition in bankruptcy was to bring about the appointment of a Trustee in Bankruptcy who would be appointed and controlled by the creditors (the officers and directors), and who would be solely aligned with these creditors to the detriment of the bankrupt. Under the circumstances, no district court or any other court is helpless to prevent a fraud upon its own jurisdiction; it can act, and should act, to prevent illegal and unequitable results, because rooted in fraud, from coming about.

This is the petitioner's argument.

Not permitting the reconsideration sought by Gibraltor is to deny it due process as well as help further the frauds of the creditors. The fact that the Trustee has aligned himself with the petitioning creditors and the intervening creditor is no reason why the court, in the interests of justice, which must always be untainted by fraud, should not look into this matter and require that to be done which should have been done previously. It would also

appear that this bankruptcy may, very probably, be most benefitted by the appointment of a special master to conduct hearings upon the existence and validity of each and every claim leading to the totals herein; validity as tested and determined pursuant to the laws of the State of New York.

Reconsideration is the means by which unscrupulous creditors are prevented from taking such advantage of the Bankruptcy Courts as to transform them into a form of authoritative collection agency. It aids in sifting the proper from improper claims. It is a preventative against frauds, and their perpetuation, prior to, during, or subsequent to adjudication.

The interests of due process, of the orderly administration of justice and regularity in Federal practice and procedure lead irresistably to this conclusion:

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

October 26, 1965.

Respectfully submitted,

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APPENDIX A

Denial for Review en Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GIBRALTOR AMUSEMENTS, LTD.,
Bankrupt-Appellant,

v.

THE WURLITZER COMPANY, WURLITZER ACCEPTANCE CORPORATION, WILLIAM WADSWORTH,
Petitioning-Creditors,

M. HALLSTED CHRIST,
Trustee-Respondent.

PETITION FOR REHEARING

Mechta & Mechta, Corona, New York, for bankrupt-appellant.

Petition denied.

17 August 1965

J. E. L.
P. R. H.
R. P. A.
U.S.C.J.J.

APPENDIX B

Petition for Rehearing en Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Appeal No. 29805

In the Matter

of

GIBRALTOR AMUSEMENTS, LTD.,

Bankrupt.

To: The Honorable Mr. Chief Justice Lumbard, Mr. Justice Hays and Mr. Justice Anderson, of the United States Court of Appeals for the Second Circuit.

The petition of Larry Leon, President of the within corporate bankrupt, respectfully shows:

1. That on the 26th day of July, 1965, the said Honorable Judges of the United States Court of Appeals for the Second Circuit, dismissed the appeal of the bankrupt herein for reconsideration of certain claims, upon the conclusion of the oral argument presented by one of the attorneys for the bankrupt, on behalf of the bankrupt.

2. That the appeal in question arose as follows:

a—from an order of Referee Duberstein directing that the trustee need take no steps to object to certain claims,

and, also, denying the bankrupt's cross-motion requesting reconsideration of those claims for cause.

b—from the order of Mr. Justice Dooling, of the United States District Court for the Eastern District of New York, denying the petition of the bankrupt herein to review the findings of the referee and sustaining the said findings of the referee.

3. The bankrupt, at no previous time, requested the claims of the creditors be proved as against it, nor were the said claims proved. That the claims were conceded by an attorney who was not authorized to appear for the bankrupt, Gibraltor Amusements, Ltd., and the said concession was made without the knowledge, consent or prior permission of the bankrupt, in the proceedings in which the bankrupt did not appear.

4. That this bankrupt has caused an investigation to be made by its attorneys, Mechta & Mechta, which said investigation is still continuing, and, as a result thereof, has found:

.01) The two claims of Wurlitzer Acceptance Corp., an intervening creditor, came into its possession by assignment from The Wurlitzer Company; that the said Wurlitzer Acceptance Corp. thereafter reassigned the said notes back to the original assignor, The Wurlitzer Company, and, thereafter, The Wurlitzer Company reassigned the said notes, once again, to Wurlitzer Acceptance Corp. That the assignments and reassignments did not involve the payment of any consideration, being mere bookkeeping entries.

.02) That these two claims, as well as all the claims presented by The Wurlitzer Company, for Wurlitzer merchandise, are based on a void guaranty which was given by the bankrupt guaranteeing the indebtedness of the New

York Wurlitzer distributor on all of its customers' notes which were given in connection with the purchase of equipment.

.03) That one of the two claims has been paid in full, and the other claim may now be paid in full.

.03) That Wurlitzer Acceptance Corp. is not authorized to do business in the State of New York, and, accordingly, according to the Laws of the State of New York, is not able to institute or *maintain* any action or proceedings in its behalf. That the appearance by Wurlitzer Acceptance Corp., in this bankruptcy, and its maintenance of the proceedings herein constitutes an act which is offensive to the Laws of the State of New York, and is malum prohibitum, and this fact was known, at all times, to Wurlitzer Acceptance Corp.

.04) That recognizing Wurlitzer Acceptance Corp. herein will amount to condoning a grave violation of law committed by this corporation, since the avowed purpose for which this corporation was created was to be the credit agent, or company, on all Wurlitzer conditional sales contracts, whether wholesale or retail, in all states wherever Wurlitzer products were sold.

.05) That this court, nor the court below, has any jurisdiction over Wurlitzer Acceptance Corp. because it is a corporation, foreign to New York, not authorized to do business in New York, and is barred from instituting or maintaining actions or proceedings in its behalf.

.06) As to Wadsworth, another petitioning creditor, a finding of "wages due in lieu of compensation" is beyond the jurisdiction of the court. Especially so since there was no award of the Workmen's Compensation Board, made at the time of the finding. Furthermore, the bankrupt herein did have workmen's compensation in-

surance and, had the claim of this creditor been a proper claim against the bankrupt, as employer, (Which the bankrupt was not, as a matter of fact, at the time of the accident involving this creditor), this creditor could have filed with the carrier for the bankrupt. Furthermore, the characterization of this creditor's claim, "in lieu of workmen's compensation" is an attempted finding of entitlement of this creditor to compensation benefits and the amount of same, which is clearly beyond the duty of a referee in bankruptcy.

.07) This creditor claimed a sum due as wages. The finding of the referee, by indirection, finds no sum due as wages. Accordingly, this creditor's claim must fall.

.08) This creditor, knowing the contrary to be true, since he received the payment of the workmen's compensation partial benefit, did not advise the referee of such fact, thereby misleading the referee into believing something was currently due and owing to him.

.09) This creditor, Wadsworth, was, upon information and belief, receiving moneys from The Wurlitzer Company, while employed by the bankrupt herein, for the purpose of supply The Wurlitzer Company with confidential information as to his employer, this bankrupt, and did not advise the referee, or the court, at any time, regarding his taking of such moneys.

.10) That the attorneys for the major petitioning creditors entered into a contingent retainer with this creditor, Wadsworth, both as to payment and amount, same being contingent upon a recovery by him in this bankruptcy, the contingency being ½ of the amount to be collected by him.

.11) Examination of the conditional sales contracts upon which The Wurlitzer Company bases its claim, show

that the said conditional sales contracts and notes were assigned by it to Wurlitzer Acceptance Corp. Therefore, the proper party in interest to claim therefor would be Wurlitzer Acceptance Corp. This creditor is not a proper party. The said contracts do not contain any assignment back.

.12) That this reveals a conspiracy between The Wurlitzer Company and Wurlitzer Acceptance Corp. to split claims so as to create another creditor.

.13) That Wurlitzer, knowing the contrary to be true, failed to reveal to the referee, or to this court, or the lower court, at any times, as its status as an agent for Wurlitzer Acceptance Corp., to whom it assigned all the commercial paper, third party or otherwise, taken from its New York distributor, and which paper was allegedly guaranteed by the bankrupt herein.

.14) That this petitioning creditor has no right to institute or maintain any actions in the State of New York, since, in its application for authorization to do business in the State of New York, and thereafter, it failed to comply with the corporate laws pertaining to foreign corporations and did not set forth its location, as well as an address to which the Secretary of State may mail process served upon him. That this recently came to light in another matter. (Suffolk & Nassau Amusement Co., Inc. v. The Wurlitzer Company, Supreme Court, Nassau County, Index No.: 3063/1964), wherein, in an endeavor to avoid service of a summons, The Wurlitzer Company claimed that the address filed with the Secretary of State of the State of New York was not the address of its location. That in such circumstances, the Laws of this state do not hold foreign corporations which have not filed the location address, to be either de jure or de facto corporations. That The Wurlitzer Company, being neither de

jure nor de facto, cannot maintain any action in the courts, or any proceedings whatsoever, of the State of New York, and, accordingly, this court and the court below exceeded its jurisdiction. That The Wurlitzer Company wilfully misrepresented its status as a qualified foreign corporation authorized to do business with the State of New York.

.15) That the major petitioning creditor, The Wurlitzer Company, deliberately failed to inform the trustee herein of collections made by it on third party paper.

.16) That The Wurlitzer Company deliberately misinformed the courts and the trustee herein by claiming a 100% credit loss on all sales made by its New York distributor, a percentage which is totally unheard of in the business world.

.17) That it has recently come to light that a chattel mortgage, ostensibly given by the bankrupt herein, to The Wurlitzer Company, contains a forgery, in that the president of Gibraltor did not sign the said chattel mortgage, nor did the witness named therein sign as such witness. That the necessary steps are being taken to expunge this chattel mortgage from the record. That the chattel mortgage is a void mortgage and the goods therein set forth must be held free of the mortgage lien and the amount of the claim set forth in the mortgage must be totally nullified.

.18) That this creditor wilfully and deliberately set about to create such a debtor out of this bankrupt as would be free of all debts except those of itself, its subsidiary and, when a third creditor was required, an employee of the bankrupt who was in its pay and whose debt was significantly small. That tax liens for withholding taxes due on Gibraltor employees were also subjected

to the fraudulent schemes of this creditor, whereby the employees were charged for 2 quarters of 1959, to Sandy Moore Distributing Corp., which, at that time, was inoperative and no longer in business, and thereafter, i.e., for the 3rd and 4th quarters of 1959, returned to the books of Gibraltor, this being a time when the employee roster was reduced by layoffs. That the tax claim of the Internal Revenue Service herein, for withholding taxes not paid by the above named distributing corporation is a tax claim which should be rightfully charged to Gibraltor in full, and payment thereon made in full, from the assets of this bankrupt's estate. That the intricacies of connivance by Wurlitzer as exhibited here are not surprising if one considers the fact that this company has put other distributors into bankruptcy, taken over the operation of another distributorship in violation of the anti-trust consent decrees, caused another distributor to purchase vending routes so as to stimulate sales of its products regardless of the financial ability of this distributor to do so; and, in connection with this bankrupt, is seeking to hold it liable for a conditional sale contract executed by a company and which was given on this creditor's representation that it would merely be held as collateral security for distributor's obligations, as no merchandise was purchased or contemplated to be purchased, and the numbers inserted in this conditional sale contract were fictional.

.19) That this creditor caused the conditional sales contracts which form the basis of its claim, by divers means even including fraud, duress, intimidation, to be executed in blank to a great extent and thereafter inserted such data as it desired; and as to others, required their execution without permitting any inspection thereof.

.20) That it maintained its own employee in the office of the New York distributor from October, 1959, through March 17, 1960, and that the said employee of Wurlitzer did go to the offices of the bankrupt, at an hour when collectors were returning from their daily rounds, and did take the money from the said collectors and count out for itself $400.00, per day, the payment made by this bankrupt on obligations, and a double payment for Fridays. And after so doing, this Wurlitzer employee would then turn over the balance of any moneys to the collectors; this, in spite of the fact that the collectors were also collecting on routes of other vending companies.

.21) That this petitioning creditor, in pursuit of its conspiracy to put the said bankrupt corporation into bankruptcy, induced the creditor Wadsworth, a Gibraltor employee at that time, to be present at 599 10th Avenue, New York City, N. Y., the former address of the New York distributor, and receive service of the writ of subpoena and petition while posing as an officer of Gibraltor.

5. Your petitioner verily believes that this court was in error in dismissing the appeal of the within bankrupt for the reasons set forth above. Greater detail than usual was set forth herein so that this court may be made aware of the motives possessed by this creditor, as well as of the need for reconsideration of the claims herein.

6. That the bankrupt herein claims it is an aggrieved party and has the right to make this application, pursuant to General Order 21(6). If the claims are subject to being proven, the bankrupt asserts that its liability to the petitioning creditors will be reduced to, at best, an insignificant fraction hereof. Further, that the offsets which The Wurlitzer Company owes to its then New

York distributor should be allowed, since they arose from the same transactions for which the guarantees from the bankrupt were demanded by Wurlitzer. That, if allowed, moneys will be owed to the bankrupt. Furthermore, if the reconsideration is not allowed, and if the Internal Revenue Service, by its own independent investigation determined that the liability for withholding taxes, now claimed as being due from Sandy Moore Distributing Corp., were actually due and owing from the bankrupt herein, since the withholding taxes were those for Gilbraltor employees, then this bankrupt will be left with a tax liability substantial in amount, increased with penalties and interest. Such tax liability is not dischargeable in bankruptcy. Reconsideration, even at this time, would show the true liability for these tax claims as being that of the bankrupt herein, and the estate, even now, is sufficient to pay this said tax liability. Rather than being absolved of all liability, the bankrupt, if rehearing is denied, will be left with a substantial and probable financial burden which will detrimentally affect its rights. This has been held sufficient reason to make a person so affected an aggrieved person. Nor can the bankrupt rely on the trustee herein to protect its rights because the trustee opposes reconsideration, or any inquiry into the nature of the txa claims, preferring to be considered liberal in his attitude of settling the tax claims on the theory they are Sandy Moore Distributing Corp. liabilities, even though the facts are otherwise; and has consistently refused to permit the bankrupt to present any evidence to him of the frauds herein concerned, and has aligned himself with the creditors at all times. Furthermore, a bankrupt has been held to have an appealable interest if the equity in the property to be recaptured would create a surplus above his debts. (Tyne v. Ventucci, 359 U. S. 974.) A proper determination of

the subject bankrupt's indebtedness is mandated herein, and a consideration of offsets due is also required. Upon the happening of these events, this bankrupt would emerge as a solvent, going corporation, for it would have a surplus above any indebtedness.

WHEREFORE, for the reasons hereinabove set forth, and those set forth in the brief on behalf of this bankrupt, and upon all of the proceedings had herein, your petitioner prays leave for a rehearing of this said appeal before this court sitting en banc, as the alleged guaranty of bankrupt is a continuing one and, apparently, not dischargeable.

LARRY LEON
Larry Leon

Sworn to before me this
29th day of July, 1965.

FRANCES MECHTA
Notary Public

FRANCES MECHTA
Notary Public,
State of New York
No. 41-2645820
Certificate filed in Queens County
Term Expires March 30, 1966

I, FRANCES MECHTA, one of the attorneys for Gibraltor Amusements, Ltd., bankrupt herein, and member of the firm of Mechta & Mechta, do hereby certify that this application for a rehearing en banc is presented in good faith and not for the purposes of delay and because of the profound belief had that frauds committed by the petitioning creditors herein, if inquired into, would result in the solvency of the bankrupt, and because of the great belief that such frauds must not be permitted to be continued.

FRANCES MECHTA
Frances Mechta

MECHTA & MECHTA
Attorneys for Bankrupt-Appellant
Office & P. O. Address
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212 Hickory 6-0581

APPENDIX C

Decision of United States Court of Appeals

PER CURIAM:

We affirm in open court the order of the district court which approved the action of the bankruptcy referee in declining to instruct the Trustee in Bankruptcy to oppose claims of certain creditors, for the reasons stated by Judge Dooling in his opinion dated June 2, 1965.

APPENDIX D

Decision of Mr. Justice Dooling, United States District Court, Eastern District of New York

DOOLING, D. J.

The petition seeks review of an order of The Honorable Samuel C. Duberstein, Referee, entered March 9, 1965, which declined to direct the Trustee to take steps to object to the claims of National Bank of Westchester, Milton Negrin, Wurlitzer Company, Wurlitzer Acceptance Corp., or William Wadsworth; the attorneys for the petitioner had requested the Trustee to do so on May 4, 1964; the Trustee asked the Referee for instructions; the attorneys for the petitioner presented an affidavit asking that the Referee direct the Trustee to oppose the claims; and, after a hearing, the learned Referee made the order sought to be reviewed.

The order of the Referee is affirmed.

1. The claim of William Wadsworth is in the amount of $125.00. The suggested grounds of objection (Affidavit of Frances Mechta, February 16, 1965, pages 7-8) include grounds authoritatively rejected more than once and, to the extent (if any) not embraced by prior adjudications, are uncertain and incomprehensible. No interest of the estate or of any creditor could conceivably be served by litigating a claim so dubiously challenged, so trifling in amount and so certain to involve an absolute economic waste of action. See Memorandum and Order of July 27, 1964, part 5.

2. The Milton Negrin claim of $1,700.00 is challenged on the theory that the note given to evidence the debt owed to Negrin was signed by Sanford J. Moore who, it is said, had no authority to sign the note.

The bankrupt in its answer to the involuntary petition alleged and the Referee in Bankruptcy determined that Milton Negrin was one of the bankrupt's more-than-twelve creditors. The fanciful assertion that Moore did not have authority to sign the note, if it were true (and the record in this bankruptcy demonstrates in a myriad of ways that it is false and it, moreover, has been adjudicated to be false by Chief Judge Zavatt's necessary finding that Moore was the bankrupt's general manager), would be beside the point. The assertion does not deny the bankrupt's indebtedness to Negrin and there is no suggestion that the debt was not in the amount of $1,700.00.

3. The National Bank of Westchester has an allowed claim of $89,353.04 on a Confession of Judgment tracing back to a guaranty executed by the bankrupt through Moore. The claim is not challenged except by the exhausted assertions that Moore was unauthorized, the

stockholders consent not effective, Mrs. Moore's signature forged in one of two places, and the consideration not shown to have gone to the bankrupt because related to Moore Manhattan activities. No evidence was brought forward, and it was not even suggested that evidence might exist, which could tend to indicate that the Trustee could successfully resist the claim on its underlying merits. The rational tendency of the supposed defects, if they had any substance, would be to change the basis of the bank's claim but not its amount or payability. The making of the loan to the Moore complex is not denied, reliance on the bankrupt's credit is not denied and the bankrupt's fraud upon the bank is hardly a defense to the claim.

4. The Wurlitzer Acceptance Corporation claim will not again be reviewed. See Memorandum and Order of July 27, 1964, part 4. If it were true that the notes were "reassigned" to Wurlitzer Company and thereafter were paid belatedly by the makers to Wurlitzer, not to Acceptance, that would not of itself and without more result in "payment" of the bankrupt's debt to Acceptance. The claim of Acceptance was based on the bankrupt's promise not on the notes that collateralized Acceptance's advance to Wurlitzer. Much more would have to be shown to arrive at the conclusion that the bankrupt's account was clear with Acceptance, and no suggestion was made that such a showing was possible.

5. Wurlitzer Company now holds allowed claims of $1,064,832.87. Other principal creditors are the National Bank of Westchester $89,353.04, Morris Karnes $15,000.00, and Wurlitzer Acceptance $9,036.00. Total claims are about $1,200,000.00. The assets collected total about $300,000.00. The expectation of the Trustee is that the

dividends to creditors may reach 15½% and could conceivably reach 20% "by some miracle".

Against the Wurlitzer claim the soi-disant attorneys for the bankrupt advance the rigamarole about the bankrupt's frauds on Wurlitzer constituting a defense to Wurlitzer's claim and the guaranty farrago, neither of which deserves further mention. See Memorandum and Order, July 27, 1964, pages 1-6, 7-8. There is also advanced the suggestion that the claim should be reduced in amount by credits for "earned bonuses" due Sandy Moore Manhattan Corp. (of whom bankrupt was the guarantor), preferential payments received by Wurlitzer in the four months before bankruptcy (amounting perhaps to $42,500), for collections from third parties after bankruptcy on ultimate-purchaser accounts which, in a normal business relation, would have been applied to reduce Sandy Moore Manhattan debt for purchases of equipment from Wurlitzer and the related debt of bankrupt, and for machines rejected or returned. The aggregate of the supposed credits is vaguely said to be in the order of $500,000.00.

The only specific data referred to indicate that the aggregate claim of Wurlitzer Company in the three categories used by the attorneys for the petitioner would have been $1,205,706.10 and that credits through March 10, 1960, would have reduced the claim to $1,114,870.38. It appears, however, that although the claim as originally made was about $1,126,000 reduced by credits to $1,064,-832.87, no (or, certainly, no other) evidence on which the Referee would have been justified in relying was proffered to him—or to the Trustee. As against that stood the prospect of a protracted contest with little prospect that the ultimate pattern of liquidation and distribution could be much altered by even substantial inroads

on Wurlitzer's claim—except that administration expenses would certainly be materially increased and the base of distribution correspondingly reduced.

The Trustee was properly concerned with, and the Referee properly took account of, a standing arrangement under which (a) Wurlitzer's counsel are not to press any claims for an allowance of fees and expenses for the very substantial and extensive legal services they have rendered to the estate in bearing a principal part of the burden of obtaining the adjudication, sustaining it, and protecting it against belated vacatur, and (b) Wurlitzer withdrew its motion to require the Trustee to pay over to Wurlitzer the proceeds of the Trustee's sales of certain equipment allegedly mortgaged to Wurlitzer under a duly recorded chattel mortgage. Rescission of the standing arrangement by reviving high priority claims—a substantial administration expense and a direct claim as a secured creditor to cash proceeds of the alleged security presented a significant risk of net loss to the remaining creditors. The attorneys for petitioner advanced nothing to relieve the Trustee's proper concern with the specific threat to the estate that the circumstances presented.

Accordingly, on the petition to review it is

ORDERED that the Order of The Honorable Samuel C. Duberstein, Referee in Bankruptcy, that the Trustee need not take any steps to object to the claims of National Bank of Westchester, Milton Negrin, Wurlitzer Acceptance Corporation, Wurlitzer Company, or William Wadsworth, entered March 9, 1965, be and it hereby is in all respects affirmed.

Brooklyn, New York
June 2, 1965

JOHN F. DOOLING
U. S. D. J.

APPENDIX E

Referee's Order of March 9, 1965

[SAME TITLE]

At Brooklyn, New York, in said District, on the 9th day of March, 1955,

A motion having duly come on to be heard before me on the 18th day of February, 1965, upon application of the Trustee for instructions with respect to the prosecution of objections to the claims of various creditors,

Now, on reading and filing the Notice of Motion dated February 8, 1965, the affidavit of Joseph Jaspan, Esq., sworn to February 8, 1965, the letter of Mechta & Mechta, Esqs., dated May 4, 1964, and the reply thereto by Joseph Jaspan, Esq., dated May 6, 1964, the affidavit of Frances Mechta, Esq., dated February 16, 1965, in opposition thereto, and after hearing Joseph Jaspan, Esq., attorney for the Trustee, Mechta & Mechta, Esqs., by Frances Mechta, Esq., Chadbourne, Parke, Whiteside & Wolff, Esqs., by Zachary Shimer, Esq., and Close, Griffiths, McCarthy & Gaynor, Esqs., with respect to said motion, and upon the record made therein and the written opinion of this Court dated February 26, 1965, it is

ORDERED, that the Trustee need not take any steps to object to the claims of National Bank of Westchester, Milton Negrin, Wurlitzer Acceptance Corp., Wurlitzer Company or William Wadsworth.

/s/ SAMUEL C. DUBERSTEIN
Referee in Bankruptcy

APPENDIX F

Referee's Decision of February 26, 1965

[SAME TITLE]

The trustee herein has petitioned this Court for instructions as to whether to file objections to certain claims upon the basis of information contained in correspondence from Mechta & Mechta, attorneys for one Larry Leon, "president" of the bankrupt.

The opinion of the late Honorable Louis J. Castellano, Referee in Bankruptcy, dated August 15, 1960, determined that each of the claims involved was, in fact, that of a creditor of the bankrupt.

There appears to be no basis for objection to the claim of Milton Negrin, filed in the sum of $1,700.00, and, in fact, Mechta & Mechta consented, in open court on December 17, 1963, to the payment of a dividend on this claim.

The claim of National Bank of Westchester, in the sum of $89,353.04, is based upon a guaranty agreement and Confession of Judgment which has been entered. It was accepted for filing upon the mandate of the United States Court of Appeals, Second Circuit. No sound basis has been presented for attacking it as to validity or amount.

The claim of Wurlitzer Acceptance Corporation, filed herein in the sum of $9,036.00, has been determined to be a valid claim throughout the litigation involving the order of adjudication.

The claim of the Wurlitzer Company, in the sum of $1,064,832.87, constitutes more than 90 per cent of the total claims filed. While broad charges have been made that the claim is subject to offsets, this Court is persuaded that protracted litigation with respect thereto would be wasteful of the assets of the estate. The Wurlitzer Company has waived its right to allege that it holds a secured claim, and its counsel have waived the right to apply for an allowance as attorneys for petitioning creditors, in the expectation that the Wurlitzer Company claim would not be disturbed. Any reduction of less than a major portion of the claim is not likely to result in any significant benefit to other creditors.

The claim of William Wadsworth for wages, in the sum of $125.00, has been the subject of considerable litigation and has been sustained at every level.

Accordingly, upon the record before me, no further proceedings need be instituted regarding these claims. Settle order on notice.

Dated: Brooklyn, New York
February 26, 1965

/s/ SAMUEL C. DUBERSTEIN
Referee in Bankruptcy

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 739

GIBRALTOR AMUSEMENTS, LTD.,

Petitioner,

—v.—

THE WURLITZER COMPANY, WURLITZER ACCEPTANCE CORPORATION, WILLIAM F. WADSWORTH and THE NATIONAL BANK OF WESTCHESTER, Petitioning Creditors, Intervening Creditor, and M. HALLSTED CHRIST, Trustee,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1965

No. 739

Gibraltor Amusements, Ltd.,

Petitioner,

—v.—

The Wurlitzer Company, Wurlitzer Acceptance Corporation, William F. Wadsworth and The National Bank of Westchester, Petitioning Creditors, Intervening Creditor, and M. Hallsted Christ, Trustee,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, The Wurlitzer Company (hereinafter "Wurlitzer") and Wurlitzer Acceptance Corporation (hereinafter "WAC"), submit this brief in opposition to the petition of Gibraltor Amusements, Ltd., Bankrupt,[1] acting through its alleged newly elected president, Larry Leon, for a writ of certiorari.

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[1] The petition misspells petitioner's name as "Gibralter."

Question Presented

The question presented in the petition (p. 2) was not raised or considered below and is therefore not one requiring review by this Court.

Statement of the Case

This involuntary bankruptcy proceeding began March 18, 1960 (App. 1a).[2] Adjudication followed on August 19, 1960 after an extended trial which produced 621 pages of testimony and 68 exhibits covering all the issues raised by the bankrupt's answers to the original, amended and intervening petitions in bankruptcy.

Those answers, verified by Sanford J. Moore, the bankrupt's dominating principal and self described "Vice President" and "operating head", contested the claims of the petitioning creditors on every conceivable ground. Not only did they deny any indebtedness to Wurlitzer and WAC but included *inter alia* were affirmative charges of creation of fraudulent obligations and documents, receipt of preferential payments and splitting of claims between Wurlitzer and its subsidiary WAC.[3] In order to sustain the petition, Wurlitzer and WAC not only had to defend against such charges but also proved their claims virtually to the penny.

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[2] References indicated "App." are to appellant's appendix in the Court of Appeals. References to the Trustee's appendix in the Court of Appeals are designated "Tr. App."

[3] These and other portions of the lengthy proceedings herein are printed in the prior papers in this Court and to avoid needless repetition, the Court is respectfully referred to the papers in Docket No. 429, October Term 1961.

Moore, through his then attorney, sought unsuccessfully to overturn the bankrupt's adjudication by review in the District Court (187 F. Supp. 931), by appeal to the Court of Appeals (291 F. 2d 22) and by petition for certiorari in this Court (denied 368 U. S. 925). Meanwhile, in further efforts to delay and impede creditors, Moore concealed and transferred to others substantial portions of the bankrupt's assets. These activities resulted in Federal indictment and prison terms for Moore and his associates (see *United States* v. *Moore, et al.* 290 F. 2d 501, cert. denied 368 U. S. 837). A separate civil action against the conspirators resulted in a partial recovery for the estate (see *M. Hallsted Christ, Trustee, etc.* v. *Vending Enterprises, Inc., et al.,* Civil Action No. 60C-1207, U. S. D. C., E. D. N. Y. [opinion not reported]) sufficient to produce about a 13½% dividend for creditors (App. 35a).

In December 1963, just as proceedings were begun to distribute this dividend, Sanford J. Moore renewed his attempts to overturn the bankruptcy. Using the present petitioner, Larry Leon, an old friend, as newly-elected "President" and new attorneys, Moore charged that the District Court never acquired jurisdiction over the bankrupt and that numerous frauds had been practiced by the petitioning creditors in asserting and proving their claims. After hearings on these charges and a finding, among others, that Leon was but another of Moore's "dummies", Chief Judge Zavatt, Referee Duberstein and Judge Dooling (on review of the Referee) concluded in separate opinions that the Moore-Leon claims were without merit, that the adjudication was proper and that the bankruptcy administration should proceed. The Court of Appeals for the Second Circuit, on January 11, 1965, affirmed the orders, from

the Bench, upon the opinions below (not officially reported) and denied petitions for a rehearing and for a rehearing *en banc*. In May 1965, just prior to the expiration of 90 days, Leon sought an extension of time in which to petition this Court for certiorari. The application for an extension was denied by Mr. Justice Harlan (Tr. App. A-10) and at petitioner's insistence was submitted to Mr. Justice Goldberg and again denied.

While these proceedings were in progress, Leon's attorneys wrote to the Trustee stating objections to the claims filed by various creditors, including Wurlitzer and WAC. After the Court of Appeals affirmed the order upholding the adjudication, the Trustee applied to Referee Duberstein for instructions with respect to the need for prosecution of objections to those claims (App. 32a-36a). The Trustee took the position that, without a showing of probable success in effecting a very substantial reduction, litigation of objections to the claims of Wurlitzer—which amounted to $1,064,837.07—and of WAC—which amounted to $9,036.00—would not be in the best interests of the bankrupt's estate (App. 35a).

Petitioner, in opposition to the Trustee's position, submitted an affidavit of its attorney detailing the grounds of objection to the creditors' claims on the basis of which it urged reconsideration. As the instant petition acknowledges (p. 15), "the bankrupt then exercised its right under the law and sought reconsideration upon its own."

After a hearing, Referee Duberstein found that the claim of WAC "has been determined to be a valid claim throughout the litigation involving the order of adjudication"

(Pet. 37).[4] With respect to Wurlitzer's claim, which constitutes more than 90% of the total claims filed, the Referee noted, *inter alia,* that "protracted litigation with respect thereto would be wasteful of the assets of the estate" and that "[A]ny reduction of less than a major portion of the claim is not likely to result in any significant benefit to other creditors" (Pet. 38). Since on the record already made such a reduction was not even remotely possible, the Referee's order (Pet. 36) directed that the Trustee need not take any steps to object to the claims of the creditors, including Wurlitzer and WAC.

Upon review in the District Court petitioner claimed that the Referee's order was erroneous in many respects but understandably at no time did petitioner raise the question of the bankrupt's status as a party aggrieved or its right to petition for reconsideration of claims presented in this bankruptcy (App. 26a-30a). Instead, petitioner again challenged the validity of the claims in view of the alleged splitting of claims, bonuses earned but not credited, preferential payments received, etc. (App. 27a-29a).

The District Court affirmed the Referee's order in an opinion which considered the merits of petitioner's allegations. No such questions having been raised, the opinion and order did not mention the bankrupt's standing as an aggrieved party or one entitled to petition for reconsideration (Pet. 31-35).

On appeal to the Court of Appeals, petitioner renewed its attack on the validity of the claims. At no time did it raise the question now sought to be presented, although its brief before that court referred to General Order in Bank-

[4] References to the petition are so denominated.

ruptcy 21(6) (pp. 18-19). The Court of Appeals affirmed, from the Bench, the orders appealed from on the decision below (Pet. 31) and thereafter denied a petition for rehearing *en banc* (Pet. 19).

REASONS FOR DENYING THE WRIT

I.

The question presented was not raised or considered by the courts below.

As pointed out above, the order sought to be reviewed was entered on the Trustee's application for instructions with respect to prosecuting objections to the claims of various creditors as urged by petitioner. During the hearing on the Trustee's application in which petitioner participated, on review in the District Court and on appeal to the Court of Appeals, the sole question raised was the necessity of requiring reconsideration of the claims of those creditors on the basis of petitioner's objections. This question was briefed and argued on the merits. At no time was the question of petitioner's standing to seek reconsideration raised or determined by the courts below.

In *Tyrrell* v. *District of Columbia,* 243 U. S. 1 (1917), this Court dismissed a writ of certiorari as improvidently granted because the question posed was not raised in the court below, stating (243 U. S., at p. 4):

> "* * * the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record and is not open for consideration, and therefore (of course, we assume, through in-

> advertence of counsel) the petition for certiorari was rested upon a wholly unsubstantial and nonexisting ground * * *"

Since the question raised was not before the lower court, it "would not be open for our consideration" (243 U. S., at p. 6).

Similarly, in *Lawn* v. *United States,* 355 U. S. 339, 362 n. 16 (1958), this Court refused to consider questions not raised below, stating:

> "This issue was not raised in the Court of Appeals. Only in exceptional cases will this Court review a question not raised in the Court below. *Duignan* v. *United States,* 274 U. S. 195, 200; *Husty* v. *United States,* 282 U. S. 694, 701, 702. There are no exceptional circumstances here."

Nor do any exceptional circumstances exist in the instant case. Petitioner has in fact presented its ground for objecting to the claims of these creditors on numerous occasions since these proceedings began in 1960. These grounds have been heard and reheard and considered and reconsidered by the courts below and rejected every time. Petitioner has obtained exactly what is sought. Accordingly there is neither a question nor a need calling for this Court to exercise its jurisdiction.

II.

The findings below that petitioner's objections were without merit and further litigation with respect thereto would be wasteful of the assets of the bankrupt's estate raise no problem of importance to the administration of the Bankruptcy Act.

The present petition is the culmination of Sanford J. Moore's third attempt to prevent payment of the claims of creditors—or at least dilute their recovery by the resulting substantial legal expense they and the estate have been saddled with. The Court is urged to review an order of the Referee, affirmed on review in the District Court after a careful examination of the vague and, at best, ambiguous contentions of the petitioner, and upheld on appeal. These contentions, as the District Court opinion makes clear, rest upon the same general charges of fraud, etc., as were litigated twice before and rejected.

The first such rejection occurred on the trial resulting in the original adjudication wherein the Referee declared with respect to Wurlitzer (Tr. App. A-16):

> "Upon the record of the trial and exhibits in evidence, I find:
>
> "A substantial part of the indebtedness of over $1,000,000.00 owed to Wurlitzer by the alleged bankrupt consisted of promissory notes in default which were secured by conditional sales contracts (Tr. 12; Pet. Cr.'s Exs. 14-21, inclusive). The notes and contracts covered several hundred Wurlitzer coin-operated phonographs and other equipment acquired or pur-

chased by the alleged bankrupt in the period of December, 1958 to and including August, 1959, and placed in operation on its juke-box route. These notes and contracts were acquired by Wurlitzer as a holder in due course (Tr. 5) and constituted valid and subsisting liens as against the alleged bankrupt, on the alleged bankrupt's property."

With respect to WAC, the Referee stated (Tr. App. A-17-A-18):

"WAC's claim against the alleged bankrupt arises from the bankrupt's guaranty of two promissory notes which WAC acquired in the regular course of its business by assignment from Wurlitzer (Tr. 52-53, 300-302; Pet. Cr. Exs. 6, 12, 34). The notes in question were executed by Hewlett Vending Co. and Phillip G. Hardy to cover the purchase of Wurlitzer phonographs from the Wurlitzer New York distributor (Pet. Cr. Ex. 12).

• • • • •

"The Hewlett note was acquired by WAC on October 31, 1958 and the Hardy note on May 28, 1959 (Pet. Cr. Ex. 34; Tr. 301), and have remained continuously in its ownership to date (Tr. 302). On the date the petition in bankruptcy herein was filed, March 18, 1960, both notes were in default, $5,261 being due on the Hardy note and $4,785 on the Hewlett note (Tr. 117-118; Pet. Cr. Ex. 35)."

On appeal from the order affirming the adjudication, the Court of Appeals stated with respect to the bankrupt's contentions regarding the invalidity of Wurlitzer's claim (291 F. 2d at p. 24):

> "There is absolutely no merit in most of them. The referee's various factual findings as to Gibraltor's insolvency, Wurlitzer's partially unsecured status and the existence of the Wadsworth debt are amply supported by the record; they surely are not 'clearly erroneous' as they must be to warrant reversal."

And with respect to WAC's claim the court held (*id.*, p. 26):

> "There has been no showing, however, that Wurlitzer has abused the distinct corporate form nor that it has used it fraudulently to subvert the Bankruptcy Act. Lacking such a showing, WAC's claim should be honored."

The second rejection of the contentions urged by petitioner occurred when the Referee dismissed petitioner's December 1963 order to show cause seeking to overturn the adjudication. The District Court upheld the Referee's order stating (Tr. App. A-3-A-4):

> "The Bankrupt's December petition is, in its main bearings, an idle effort to turn its own misconduct into a right to relief by charging as frauds against the petitioning creditors their failure in 1960 to discover what Bankrupt had done."

After a careful analysis of each of the contentions of fraud raised at the time—and raised again in the instant petition —the District Court concluded that they were "so devoid of merit" that the "Referee had no alternative except to grant summarily the relief granted" (Tr. App. A-9).

Undaunted, petitioner tried again by requesting that the Trustee object to the claims, and was again rebuffed. With respect to Wurlitzer the District Court stated (Pet. 34):

> "Against the Wurlitzer claim the soi-disant attorneys for the bankrupt advance the rigmarole about the bankrupt's frauds on Wurlitzer constituting a defense to Wurlitzer's claim and the guaranty farrago, neither of which deserve further mention. See Memorandum and Order, July 27, 1964, pages 1-6, 7-8 [Tr. App. A-1—A-6]."

As to the remainder of the claims, the District Court noted that no specific data was presented by petitioner to even remotely indicate that Wurlitzer's claim could be substantially reduced and then stated (Pet. 34-35):

> "As against that stood the prospect of a protracted contest with little prospect that the ultimate pattern of liquidation and distribution could be much altered by even substantial inroads on Wurlitzer's claim—except that administration expenses would certainly be materially increased and the base of distribution correspondingly reduced."

With respect to WAC, the District Court pointed out that petitioner had failed to make any showing which could even remotely justify reducing the amount of WAC's claim, stating (Pet. 33):

> "Much more would have to be shown to arrive at the conclusion that the bankrupt's account was clear with Acceptance, and no suggestion was made that such a showing was possible."

These holdings raise no important problems in the administration of the Bankruptcy Act because they are neither inconsistent with General Order 21(6) nor subversive of the legislative purpose of the Act. As this Court has said, "the object of bankruptcy laws is the equitable distribution of the debtor's assets amongst his creditors; * * *." *Kuenher* v. *Irving Trust Company,* 299 U. S. 445, 451 (1937). That object will be furthered here by denial of the petition for the writ, which should finally halt the continuing and wasteful attempts to relitigate stale, rejected contentions over and over again.

As was aptly pointed out long ago in *In re Henry Ulfelder Clothing Company,* 98 Fed. 409, 412 (N. D. Calif. 1899):

> "The law certainly does not contemplate that the petitioning creditor shall be required to establish the validity of a particular claim against the bankrupt more than once in the same proceeding unless the court shall, upon some legal ground, grant a new trial of such issue."

Here, no such ground has been shown to exist and the courts below have repeatedly rejected petitioner's contentions as totally lacking in merit.

CONCLUSION

The issues involved in this particular case are of interest only to the immediate litigants. No problem of Federal law deserving the attention of this Court is presented. Accordingly the petition for a writ of certiorari to review the order of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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December 2, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 739

GIBRALTOR AMUSEMENTS, LTD.,
Petitioner and Bankrupt-Appellant,

—against—

THE WURLITZER COMPANY, WURLITZER ACCEPTANCE CORPORATION, WILLIAM F. WADSWORTH and THE NATIONAL BANK OF WESTCHESTER, Petitioning Creditors, Intervening Creditor, and M. HALLSTED CHRIST, Trustee,
Respondents.

BRIEF FOR RESPONDENT-TRUSTEE IN BANKRUPTCY

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BRIEF FOR RESPONDENT-TRUSTEE IN BANKRUPTCY

Statute Involved

Although petitioner purports to present a question involving General Order in Bankruptcy 21(6), this respondent respectfully submits that the General Order should be read in conjunction with Section 57k of the Bankruptcy Act (11 U. S. C. 93k), which reads as follows:

"Claims which have been allowed may be reconsidered *for cause* and reallowed or rejected in whole or in part *according to the equities of the case*, before but not after the estate has been closed" (emphasis supplied).

Statement of Case

An involuntary petition in bankruptcy was filed against Gibraltor Amusements, Ltd. in the Eastern District of New York on March 18, 1960. After an extended trial of the issues raised by the involuntary petition as amended and the bankrupt's answers, the Referee, *inter alia*, "held that the alleged debts (of petitioning creditors and others) and acts of bankruptcy had been amply proven" (see 291 F. 2d at 24), and entered an order of adjudication on August 19, 1960, which was affirmed by the District Court (187 F. Sup. 931), and by the United States Court of Appeals (291 Fed. 2nd 22), and an application for a Writ of Certiorari was denied in December 1961 (368 U. S. 925).

In December 1963, the Respondent-Trustee applied to the District Court for an order approving his account and directing distribution of the estate. At that point in the administration of the estate, one Larry Leon, claiming to be the "newly elected president" of the bankrupt, moved to vacate the order of adjudication referred to above. Among other things, he alleged various frauds by the three petitioning creditors and challenged their rights as creditors.

The petition to vacate the order of adjudication was denied by the Referee and by the District Court and affirmed upon the opinions below by the United States Court of Appeals on February 4, 1965. (No official or unofficial citation). An application to this Court to enlarge the time within which to file a petition for a Writ of Certiorari was denied on May 7, 1965 by Mr. Justice Harlan in the following language:

> "I consider the chance of certiorari being granted too remote to justify an extension of petitioner's time, the effect of which would be to delay distribution of this estate for the summer. Application denied."

In the meantime, the counsel for the said Larry Leon, "President" of the bankrupt, acting for the bankrupt, directed a letter to the Trustee, challenging the validity and amount of various claims of creditors, including each of the three petitioning creditors.

The Trustee, therefore, in February of 1965, petitioned the Referee in Bankruptcy for instructions as to whether further steps should be taken to litigate these claims and due notice of the application was given to the bankrupt and to the various creditors involved. The Referee in view of the long history of litigation and the record evidence with respect to the claims of the petitioning creditors, ruled that no further action with respect to the claims should be taken (Appendix F), and an appropriate order was entered on March 9, 1965 (Appendix E), which was affirmed by the District Court on June 2, 1965 (Appendix D), and by the United States Court of Appeals on July 26, 1965 (Appendix C), with a petition for a rehearing en banc denied on August 17, 1965. It is this order which is now presented to this Court for possible review.

The Question Presented by Petitioner Upon This Application is Academic

The lower courts have already considered at length all of the arguments of counsel for the bankrupt and have decided, in their discretion, that the claims to which the bankrupt has raised objection should not be further litigated.

It is of little import that the issue was joined by a petition of the Truste for instructions upon notice to the bankrupt rather than by separate petition of the bankrupt. Indeed, General Order 21(6) refers to a petition for reconsideration by either "the trustee or any creditor or the bankrupt or debtor".

Nor was the Bankruptcy Court under a mandate to grant the petition for reconsideration as urged by the bankrupt.

Section 57k of the Bankruptcy Act, permits reconsideration of claims "for cause * * * according to the equities of the case". Whether or not there is sufficient cause for reconsidering the allowance of claims lies in the sound discretion of the Court.

McLeod v. *Boone* (C. C. A. 9th Cir.) 91 Fed. 2d 71;

Blanke Mfg. & Supply v. *Winnfield Light & Ice Co.* (C. C. A. 8th Cir.) 290 Fed. 180.

In the instant case, the Referee and the District Court found that the prosecution of further objections to the claims of creditors as sought by the bankrupt would involve the relitigation of claims already extensively litigated and adjudicated, the trial of issues lacking in substantial merit, and protracted hearings without practical value to the bankruptcy estate.

The Trustee's petition for instructions having been studied in the light of the issues raised by the bankrupt and ruled upon by the Referee, and confirmed by the District Court, the question proposed by this petition for certiorari seems academic. The bankrupt was not denied an opportunity to be heard on a petition for reconsideration. It merely failed to persuade the Court that reconsideration was necessary or advisable.

Certainly, this petition for a Writ of Certiorari presents no Federal question of substance or a decision of a Court of Appeals which is in conflict with the decision of another Court of Appeals, or any consideration set forth in Rule 19 of the Rules of this Court.

The Order Denying the Petition for Reconsideration is not Appealable

Although this point has not been raised in the District Court or the Court of Appeals, Respondent-Trustee now urges that in any event the order of the Referee which in effect denied reconsideration of claims theretofore allowed is not appealable.

> *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149-150;
>
> *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131.

The rule is summarized in 3 Collier on Bankruptcy, 14 Edition, 370 as follows:

> "Whether or not a petition for reconsideration will first be granted is within the sound discretion of the Bankruptcy Court (Referee or Judge) and a review or an appeal may not be taken from a denial thereof."

This bankruptcy case has been pending for more than five years. As this Court said in *Gandesk* v. *Pan American Airways, Inc.*, 86 S. Ct. 153, "litigation must at some point come to an end".

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DISMISSED UPON THE GROUND THAT THE ORDER DENYING RECONSIDERATION IS NOT APPEALABLE OR IN ANY EVENT THE PETITION SHOULD BE DENIED UPON THE GROUND THAT NO FEDERAL QUESTION OF SUBSTANCE HAS BEEN PRESENTED.

Respectfully submitted,

JOSEPH JASPAN,
Attorney for Respondent-Trustee.